STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 10, 2011
v	No. 296345 Wayne Circuit Court
MD JAMRUL HUSSAIN, Defendant-Appellant.	LC No. 08-017344-FH

Before: FITZGERALD, P.J., and SAWYER and BECKERING, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of one count of criminal sexual conduct in the third degree. MCL 750.520d(1)(a). He was sentenced to a term of 18 months to 15 years in prison. He now appeals and we affirm.

Defendant first argues that the trial court erred in failing to suppress two statements made by him to the police. The first statement was made at his home and the second statement was made at the police station. Defendant primarily argues that the first statement was obtained without the *Miranda*[1] warnings being read and that, with respect to the second statement, which were preceded by *Miranda* warnings, the warnings were inadequate because they were not translated into his native language, Bengali. We disagree.

With respect to the first statement, the investigating officer, Detroit Police Sgt. Lisa Spitzer, stated that she had not read him the warnings because defendant was not in custody at the time. Those statements were made in the context of the police investigating the disappearance of a two-year-old child. While most of defendant's statement to the police was in regards to the missing child case, defendant did indicate that he had sex with a fifteen year old. It is that admission that lead to the current conviction, with the victim testifying that a few months prior to the missing child investigation defendant had kidnapped and raped her.[2]

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

[2] Defendant's statement to the police indicated that the sex had been consensual and that he and the victim had been in love with each other at the time. Defendant apparently brought the matter

Miranda warnings need be given only if a defendant is in custody at the time of a police-initiated interrogation. *Maryland v Shatzer*, ___ US ___; 130 S Ct 1213, 1219; 175 L Ed 2d 1045 (2010). Defendant, however, offers no argument that he was, in fact, in custody for *Miranda* purposes beyond an unsupported assertion that he was in custody. Sgt. Spitzer, on the other hand, whose testimony the trial court found to be credible, testified that defendant was not in custody. She further testified that the police had been invited into defendant's home and that this was the latest of several conversations that she had had with defendant and his live-in girlfriend (the missing girl's mother) regarding the girl's disappearance. Defendant was not told that he could not leave nor was he was handcuffed. Indeed, the police left the premises without defendant in custody.

Defendant makes vague references to being "intimidated by the number of officers in the home" and that "he was under the impression that he must do whatever the police requested . . . ." This Court has referenced the traditional tests of custody, whether a person's freedom of action has been deprived in any significant way and whether a reasonable person would feel free to leave, in assessing custody for *Miranda* purposes. *People v Mendez*, 225 Mich App 381, 382-383; 571 NW2d 528 (1997). But it is interesting to note that in *Shatzer*, the Court emphasized "that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody." 130 S Ct at 1224. The Court noted, for example, that while traffic stops and *Terry*[3] stops involved a detention, neither constitutes custody for *Miranda* purposes. 130 S Ct at 1224. Even incarceration in prison on a different charge is not deemed to be custody for *Miranda* purposes under *Shatzer*. 130 S Ct at 1225. And given that it was only during this interview that Sgt. Spitzer learned of the criminal sexual conduct incident, any custody would have to have existed with respect to the missing child case and not as to the current case. And, although the question is not directly before us, we note that the United States Supreme Court has granted certiorari in *Howes v Fields*, ___ US ___; 131 S Ct 1047; 178 L Ed 2d 862 (2011), to address the question whether *Miranda* warnings must be given to a suspect who is in custody on a charge other than one for which the suspect is being interrogated.

In sum, the trial court found Sgt. Spitzer's testimony to be credible, that the police had been invited into the home, that defendant had not been handcuffed, that she did believe that a custodial environment had been created and that the police left without defendant being in custody. Although defendant did testify that he not feel that he was free to leave, the trial court rejected defendant's testimony as being an "incredible tail [sic]" being put forth by defendant. Our review of the determination whether a person is in custody for *Miranda* purposes is de novo. *Mendez*, 225 Mich App at 382. With the above considerations in mind, we are not persuaded that defendant has established that he was, in fact, in custody at the time of the interview in his home and, therefore, that the police were obligated to give the *Miranda* warnings prior to questioning.

Turning to the second statement, made at the police station following the *Miranda* warnings, defendant argues that those warnings were ineffective because of the lack of an

up because he believed that the victim's father, who apparently disapproved of defendant's relationship with his daughter, may have known something about the disappearance of the child.

[3] 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968).

interpreter to translate the warnings into his native Bengali. We disagree. Defendant relies upon two cases from this Court, *People v Truong (After Rem)*, 218 Mich App 325; 553 NW2d 692 (1996), and *People v Brannon*, 194 Mich App 121; 486 NW2d 83 (1992). *Truong*, however, is not on point. In *Truong*, a translator was present and did translate the *Miranda* warnings. This Court agreed with the trial court that the defendant understood his rights before waiving his rights. 218 Mich App at 334-335.

Brannon, however, is only slightly more helpful to this case. *Brannon* involved a suspect who was deaf and it did primarily center on the application of the Deaf Persons' Interpreters Act, MCL 393.501 *et seq.* 194 Mich App at 127. This is not an issue in the case at bar. Defendant seems to read *Brannon* as requiring that *Miranda* warnings be read in a suspect's primary language. We believe that defendant misreads *Brannon*. *Brannon* does state that a waiver of rights "is intelligently made when the *Miranda* warnings are explained to the defendant by an interpreter familiar with and competent in the defendant's primary language." But we do not read this as establishing a requirement that an interpreter must be used whenever the suspect's primary language is not English. Rather, we read *Brannon* as holding that the *Miranda* warnings are adequate if given through a competent translator if there is a language issue. But it would be absurd to suggest that an interpreter must be used every time that the police interrogate a suspect whose native language is one other than English without regard to the suspect's fluency in English. It would serve no legitimate purpose to require a translator for a suspect whose fluency in English might even be greater than that of many native English speakers.

Rather, we must determine whether, in light of the totality of the circumstances, the defendant's statements were voluntarily given, including whether defendant understood his rights. *Brannon*, 194 Mich App at 131. In doing so, while we make an independent determination, we give great deference to the trial court's assessment of the witnesses' credibility, and we will not reverse its findings of fact unless clearly erroneous. *Id.*

The trial court in this case concluded that defendant was sufficiently fluent in English that he understood his rights. That conclusion was based upon Sgt. Spitzer's testimony regarding her dealings with defendant, involving several conversations over a few days, as well as the trial court's own observation that defendant had participated in several court hearings without an interpreter and seemed to be able to adequately communicate with counsel. There was no request for an interpreter at those prior proceedings.[4] As noted above, the trial court found Sgt. Spitzer's testimony credible, while rejecting defendant's testimony as an "incredible tail."

[4] There was an interpreter at the second day of the hearing on defendant's suppression motion. The genesis of this came at the end of the first day of the hearing. The trial court had already raised the point of defendant's various court appearances and meetings with defense counsel without an interpreter present. Defense counsel suggested that "there may be a need for a [sic] interpreter." The trial court responded by saying, "I'm not going to take that chance. So I will have a Bangladesh interpreter until these proceedings are complete." At the second hearing, defense counsel refers to requesting an interpreter for the hearing, while the trial court references providing an interpreter sua sponte.

Giving deference to the trial court's assessment of credibility, we are not persuaded that the trial court erred in its conclusion that defendant was sufficiently fluent in English to have adequately understood his constitutional rights before agreeing to make a statement to the police. Accordingly, we reject defendant's argument that his statement should be suppressed due to the lack of an interpreter.

Next, defendant argues that the trial court erred in admitting a transcript of a telephone conversation between defendant and his girlfriend. In the conversation, which occurred while defendant was in jail awaiting trial on the current charges, defendant admitted to engaging in fellatio with an unnamed, underage girl. Defendant objected to the admission of the transcript on the basis of relevance. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. While, as the trial court pointed out, this piece of evidence is hardly the "smoking gun" that clearly establishes defendant's guilt, we agree with the trial court that the evidence is relevant.

Defendant is correct that the statement did not identify with whom defendant had engaged in the sexual activity. But the statement was made while defendant was in jail on the pending charge and defendant made the statement, "The fucking girl got me good today you know." The jury could reasonably infer that the girl referred to in the conversation was the complainant. Defendant also argues that the statement was not relevant because, in the conversation, defendant denied engaging in sexual intercourse with the underage girl, and that it was only fellatio; and defendant was only charged with engaging in sexual intercourse with the complainant. But defendant's admission that he had engaged in any sexual activity with the girl would make it more believable that he had also engaged in sexual intercourse with the girl. Accordingly, we agree with the trial court that the evidence was relevant.

Defendant also argues that the evidence was unduly prejudicial. MRE 403. Defendant did not raise this issue in the trial court.[5] Accordingly, we review the matter for plain error affecting defendant's substantial rights. *People v Knox*, 469 Mich 502, 508; 674 NW2d 366 (2004). While we might agree with defendant if this were the case of the prosecutor obviously introducing evidence of sexual acts completely unrelated to the charged offense, that is not the case here. As discussed above, a jury could reasonably infer that the unnamed, underage girl was in fact the complainant. Furthermore, we do not believe that it is obviously unfairly prejudicial to introduce evidence of a different sexual act with the victim than the charged act because, as discussed above, any sexual act with the victim makes it more probable that the charged sexual act occurred, even if different in nature.[6] Indeed, even the rape-shield rule allows introduction of evidence of the victim's prior sexual relations with the defendant. MRE

[5] Both the prosecutor and the trial judge did make reference to MRE 403. But the context of those references would suggest that they were actually referring to MRE 401.

[6] We also note that the context of the conversation, a statement made to defendant's girlfriend, suggests a reason for defendant to down play the activity with complainant and to minimize the nature of what happened.

404(a)(3). If a victim's prior sexual relations with the defendant is relevant, than certainly so is the defendant's prior sexual relations with the victim.

For these reasons, we conclude that it is not obviously the case that any danger of unfair prejudice outweighs the probative value of the evidence under MRE 403. Therefore, defendant has not established that he is entitled to relief under the plain error rule.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ David H. Sawyer
/s/ Jane M. Beckering